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In the Supreme Court

of the United States

OCTOBER TERM, 1967

No. 1017

JOHN HOUSER,

Petitioner,

v.

J. J. O'LEARY, Deputy Commissioner,
Fourteenth Compensation District,

and

AMERICAN MAIL LINE, LTD., a corporation,

and

FIREMAN'S FUND INSURANCE COMPANY,
a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Ninth Circuit

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J. J. O'LEARY, Deputy Commissioner,
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AMERICAN MAIL LINE, LTD., a corporation,

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FIREMAN'S FUND INSURANCE COMPANY,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Ninth Circuit

The Petitioner, John Houser, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW
AND ORDER EXTENDING TIME FOR FILING PETITION

This is a longshoreman's claim for benefits under the Longshoreman's and Harborworker's Compensation Act as amended, 33 U.S.C.A. § 901 et seq.

The opinion of the respondent Deputy Commissioner was rendered on July 15, 1965. The opinion is unreported, and a copy is appended to this Petition as "Appendix A."

A libel was thereafter filed in the United States District Court for the District of Oregon. The opinion of the District Court was rendered on March 19, 1966, and is reported in 253 F. Supp. 417. A copy of the opinion is appended to this Petition as "Appendix B."

The opinion of the Court of Appeals for the Ninth Circuit was rendered on September 27, 1967, and is reported at 383 F.2d 730. A copy is appended to this Petition as "Appendix C."

On December 18, 1967, Mr. Justice Abe Fortas signed an Order extending the time for filing this Petition to January 15, 1968.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Ninth Circuit by writ of certiorari is conferred by 28 U.S.C.A. § 1245(1) and § 2101(c).

The jurisdiction of the District Court was conferred by 33 U.S.C.A. § 921, and 5 U.S.C.A. §§ 701-706.

QUESTION PRESENTED

The sole question presented by this Petition is whether a longshoreman, injured on a dock extending into the navigable waters of the Willamette River while loading a vessel berthed at the pier, is entitled to benefits under the Longshoremen's & Harbor Workers' Compensation Act.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following Constitutional provisions and statutes are material to our argument in support of the Petition.

The Constitution of the United States provides:

> "Article I, Section 8. The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.
>
> "Article III, Section 2. The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C.A. § 901 et seq., provides:

"Section 903. *Coverage.*

(a) Compensation shall be payable under this Chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ."

The Admiralty Extension Act, 46 U.S.C.A. § 740 provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

STATEMENT OF THE CASE

On May 1, 1965, the petitioner was employed by American Mail Line, Ltd., an employer subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (R. 1, 8). The petitioner was one of a gang of longshoremen (R. 41) who were engaged in loading the vessel GUAM BEAR (R. 21), which was berthed at Terminal No. 1, Berth No. 7, on the Willamette River in Portland, Oregon (R. 21).

The length of the pier on its face at Berth No. 7, is 1,100 feet (R. 28), and the face extends out 34 feet over the water (R. 26-27, 39-40). At one end of the

dock is a slip, 630 feet long, at which ocean going vessels also berth (R. 30-31). Along the face of the dock, and running almost its entire length, are two lines of railroad track, the center of the outermost tracks being eight and one-half feet from the river edge of the dock (R. 27-28).

The water of the Willamette River runs beneath the dock, and small boats sometimes navigate under the dock (R. 39-40).

On the date in question, the petitioner was working on a gondola car on the railroad track closest to the ship (R. 42). which was berthed at the face of the dock (R. 39). He was one of two slingmen engaged in hooking up a load of creosoted piling on the gondola car to the ship's gear for loading aboard the vessel (R. 40-42). While engaged in performing this duty, the petitioner suddenly appeared to straighten up, slipped, and fell down on the shoreward side of the car, suffering injuries (R. 41-43, 58-59).

Slingmen are regular members of a gang of longshoremen, the rest of whom work aboard the ship (R. 46). Slingmen sometimes go aboard the ship for the purpose of getting to barges on the water, on which they frequently work (R. 41, 60). They also work directly and immediately with the man on the ship in rigging the vessel, handling parts of the ship's rigging in the process when it is convenient to do so (R. 60).

On June 16, 1965, Deputy Commissioner O'Leary

held a hearing, and on July 15, 1965, made and entered a compensation order, rejecting the petitioner's claim for benefits under the Longshoremen's and Harbor Workers' Act upon the ground that the petitioner's injuries "did not occur upon the navigable waters of the United States * * *." (See Appendix A.) The petitioner then instituted proceedings in admiralty in the United States District Court for the District of Oregon pursuant to 33 U.S.C.A. § 921 and 5 U.S.C.A. §§ 701-706 for the purpose of reviewing the Deputy Commissioner's determination. The petitioner's employer and compensation insurance carrier were permitted to intervene (R. 5, 7). All parties moved for a summary judgment (R. 11, 137, 139), and the District Court, Honorable Gus J. Solomon, Judge, rendered an opinion upholding the determination by the Deputy Commissioner (R. 141). Judgment was accordingly entered granting the motions of the respondents for summary judgment (R. 145). The petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment below. (See Appendix C). The Circuit Court agreed with the District Court that an injury upon a pier is not "an injury occurring upon the navigable waters of the United States" within the purview of Section 903 of the Longshoremen's and Harbor Workers' Compensation Act.

REASONS RELIED UPON FOR GRANTING THE WRIT

There are two reasons why this writ ought to be granted. *First*, the decisions below are contrary to the *ratio decidendi* of *Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196 (1962). *Second*, the issue presented here is vital to the administration of the Longshoremen's and Harbor Workers' Act and requires an authoritative decision of this Court. Because of a narrow interpretation of the Act in the circuit and district courts, the compensation rights of harbor workers are sinking into confusion which it was the purpose of Congress in passing the Act, and more recently of this Court in *Calbeck*, to bring to an end.

The issue presented by this case is whether a longshoreman injured on a dock while loading a ship is entitled to coverage under the Longshoremen's and Harbor Workers' Compensation Act. The issue is no stranger to the courts. There are, in addition to ours, two petitions for certiorari involving the same problem presently pending before this Court: *Andrew Nicholson* v. *C. D. Calbeck, Deputy Commissioner, et al*, No. 877, (October Term, 1967); *James D. McCollough* v. *The Travelers Insurance Company and Levingston Shipbuilding Company*, No. 788 (October Term, 1967). Both of these petitions are for review of decisions of the United States Court of Appeals for the Fifth Circuit. In addition, there are now pending before the United States Court of Ap-

peals for the Fourth Circuit rehearings in the case of *Albert Avery* v. *Jerry C. Oosting, et al,* Docket No. 10,323; in the case of *William H. Johnson* v. *John P. Trainer, Deputy Commissioner, et al,* Docket No. 10,298; and in the case of *Julia T. Kloseck* v. *John P. Trainer, Deputy Commissioner,* Docket No. 10,299, all of which involve issues analogous to ours. It has been estimated that one of every two longshoremen is injured on the job each year and that fully 25% of all injuries to longshoremen occur on wharves or piers as the men work back and forth between the wharf and the ship loading and unloading cargo. (42 New York University of Law Journal 331, 344, footnote 114; footnote 67 at p. 337; National Academy of Sciences—National Research Council, Longshore Safety Survey (Wash., D. C., 1956) p. 1 et seq.).

Our problem is created by the language which Congress chose to describe the conditions for compensability of maritime injuries. Section 903(a) provides that compensation shall be payable "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law * * *."

Legislative History of the Act

To understand the purpose and meaning of this language, as well as our contention that the lower

court decisions in this case fail to give effect to the opinion of this Court in *Calbeck* v. *Traveler's Insurance Co.*, it is necessary to review the history of Section 903.

The occasion and necessity for the Longshoremen's and Harbor Workers' Act was a series of cases decided by this Court concerning the application of State law within the admiralty jurisdiction. In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 39 S. Ct. 524 (1917), this Court ruled that Federal maritime law occupied the area of admiralty jurisdiction conferred upon the Federal Government by Article III, Section 2 of the Constitution, and held that State workmen's compensation laws could not constitutionally be applied to an injury occurring upon navigable waters within the Federal admiralty jurisdiction to an employee engaged in maritime employment, because to do so would destroy the uniformity of the Federal maritime law which the Constitution was intended to establish. The employee injured in *Jensen* was a longshoreman engaged in unloading cargo, and the injury was sustained on a gangplank over navigable waters between the vessel and the wharf. See *Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 117 (1962). Two Federal statutes designed to permit the application of State workmen's compensation laws to injuries in maritime employment upon navigable waters were later held to be unconstitutional. *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 40 S. Ct. 438 (1920); *Washington* v. *Dawson*, 264 U.S. 219, 44 S. Ct. 302 (1924).

Perhaps in heed of the criticisms leveled at its decisions in *Jensen* and *Knickerbocker*, and in recognition of the harsh results engendered by these cases, this Court formulated the "local concern" doctrine which permitted workmen to recover under State workmen's compensation laws for injuries occurring upon navigable waters within the admiralty jurisdiction, provided that the activities and contracts of maritime employment of the employees affected were matters of merely "local concern," not directly related to navigation or commerce. This Court reasoned that in such circumstances the application of State procedures and remedies would not destroy the uniformity of the Federal maritime law required by the Constitution. *Grant-Smith-Porter* v. *Rohde*, 257 U.S. 469, 42 S. Ct. 157 (1922).

At the same term, this Court held that State workmen's compensation could be applied, without reference to the "local concern" doctrine, by direct operation of state law for injuries occurring upon extensions of land into navigable waters, such as piers and wharves, because injuries upon land and such extensions were within the recognized non-maritime area of state jurisdiction. *Industrial Commission* v. *Nordenholt*, 259 U.S. 263, 42 S. Ct. 473 (1922) (injury to longshoreman working on a pier).

In the context of these decisions, the Longshoremen's Act was drafted and adopted. As originally drafted, and sponsored by the International Longshoremen's Association and unions representing ship

repairmen and allied trades, the Bill would have applied to "any employment performed on a place within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation or commerce * * *." Hearings on S. 3170, Senate Judiciary Committee, 69th Congress, First Sess., p. 2 (hereafter "Senate Hearings"). In that form, the bill was apparently designed to provide coverage only for injuries within the admiralty tort jurisdiction where they were not compensable under state workmen's compensation acts, whether applying of their own force or under the new "local concern" doctrine.

At the Senate Hearings, representatives of the interested labor organizations testified generally in support of the Bill, explaining the need for it as a result of the *Jensen*, *Knickerbocker* and *Dawson* decisions, and noting that all but six of the states had workmen's compensation laws. Senate Hearings, pp. 18-44, 37. An attorney for the unions also explained that the locus of the injury was the sole test for admiralty tort jurisdiction and that longshoremen injured while on a wharf or pier were within the tort jurisdiction of the states, which could validly provide compensation for them by state laws. *Id.* at pages 29-31. He noted that if a longshoreman fell while going between the ship and the wharf and hit the wharf he would be covered under the local compensation law, but if he fell between the ship and the wharf he would be denied state compensation. *Id.* at 29-30.

The proposed exclusionary language "except employment of local concern and of no direct relation to navigation or commerce" was described by employer groups as being unnecessarily broad and ambiguous, and as being a potential breeder of litigation. *Id.* at pages 57, 91, 95. Apparently in response to these criticisms the Senate Committee recommended the "upon navigable waters" limitation now embodied in 33 U.S.C.A. § 903 (a) which, of course, does not include the "local concern" phraseology. Senate Report 973, 69th Congress, First Sess., p. 2. The Senate Judiciary Committee made it clear that the Bill was made necessary by this Court's decisions in *Jensen*, *Knickerbocker* and *Dawson*, and that it was designed to cover repairmen, longshoremen and other amphibious harborworkers. Senate Report 973, supra, pp. 16-17. The Committee noted that under its recommended language "injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship *so as to bring them within the maritime jurisdiction of the United States.*" *Id.* p. 16. (Emphasis added). The language recommended by the Senate Judiciary Committee, was, of course, the language now found in 33 U.S.C.A. 903(a). The Committee's report indicates that in use of the language "navigable waters" it was exhausting the limits of what was then felt to be the maritime jurisdiction of the United States over personal injuries.

In a series of cases arising after the adoption of the Act in 1927 (Mar. 4, 1927, C. 509, § 1, 44 Stat.

1424), it soon became apparent that the original Congressional concept, derived from *Jensen*, of an impassable barrier between federal maritime and state non-maritime jurisdiction was inaccurate. Problems of construction arose first with the "local concern" doctrine. Before the passage of the Act, the Court had held various activities to be subject to State law because, although maritime, they were of sufficiently local concern to support State jurisdiction. *Grant-Smith-Porter Ship Co.* v. *Rhode*, 257 U.S. 469, 42 S. Ct. 157 (1922). In *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244, 62 S. Ct. 221 (1941), this Court held that there could be concurrent Federal and State compensation coverage in areas of "local concern." There followed the doctrine of the "twilight zone." *Davis* v. *Department of Labor and Industries*, 317 U.S. 249, 63 S. Ct. 225 (1942). This, too, permitted coverage under either State or Federal law, despite the language of 33 U.S.C.A. § 903 which limits Federal coverage to situations where compensation "* * * may not validly be provided by State law."

Then, in *Avondale Marine Ways* v. *Henderson*, 347 U.S. 366, 74 S. Ct. 100 (1953), this Court held that a workman on a marine railway came within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act, because a marine railway was held to be a dry dock, even though the vessel being worked on was 400 feet from the water, and clearly subject to State coverage. (See the opinion in the court below, 201 F.2d 437, 438, C.A. 5, 1953).

Thus, from the original position in which the two spheres of authority were thought to be mutually exclusive, it gradually became apparent that there was a considerable area of overlap including activities of "local concern," "twilight zone" activities, and marine railways on land, for all of which the States could validly provide compensation, but for which compensation was nevertheless held to be afforded under the Longshoremen's and Harbor Workers' Compensation Act, despite the statutory language.

While this area of concurrent jurisdiction was being delineated in the courts, the tort admiralty jurisdiction of the United States was at the same time moving inland from the water's edge, *Strika* v. *Netherlands Ministry of Traffic*, 185 F.2d 555, 558 (C.A. 2, 1950), a move memorialized in the Admiralty Extension Act of 1948, which extended the admiralty and maritime jurisdiction of the United States to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." (46 U.S.C.A. § 740, June 19, 1948, C. 256, 62 Stat. 496). This Court has not only upheld the Admiralty Extension Act against Constitutional challenge, but has indicated that it will not be construed in a niggardly way. *Gutierrez* v. *Waterman's Steamship Corporation*, 373 U.S. 206, 210, 83 S. Ct. 1185 (1963).

At the same time, the "contract" admiralty jurisdiction of the Federal courts, which has always de-

pended upon *status* rather than *situs*, *North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U.S. 119, 39 S. Ct. 221 (1919), was moving gradually into the field of personal injury law under the guidon of "express" and "implied warranties" of the stevedore. *American Stevedores* v. *Porello*, 330 U.S. 446, 67 S. Ct. 847 (1947); *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U.S. 124, 76 S. Ct. 232 (1956); *Crumady* v. *Joachim Hendrik Fisser*, 358 U.S. 423, 79 S. Ct. 445 (1959); *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 84 S. Ct. 748 (1964). This line of authority finds its culmination in *Sanderlin* v. *Old Dominion Stevedoring Corporation*, 45 A.M.C. 1691 (C.A. 4th, October 26, 1967) (Court of Appeals Docket No. 11,211), in which a cargo checker injured on a pier through the negligence of the defendant stevedore was permitted to recover damages by a suit in admiralty as the third-party beneficiary of an express warranty of workmanlike performance in the contract between the stevedore and the plaintiff's employer. The opinion (by Judge Sobeloff) makes it clear that the result would be the same if the warranty were implied rather than express.

Calbeck v. Traveler's Insurance Co.

This, then, was the history and maincurrent of admiralty law involving the Act when the Court decided *Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196 (1962). *Calbeck* involved an injury to an employee who was engaged in the work of completing construction of a vessel afloat on navi-

gable waters. Before the Longshoremen's and Harbor Workers' Act was passed, this Court had sustained the validity of a State workmen's compensation statute as applied under such circumstances. *Grant-Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, 42 S. Ct. 157 (1922). In *Calbeck*, the lower court therefore reasoned that the limitation of coverage under Section 903(a) to those situations where recovery "may not validly be provided by State law" excluded the application of the Act to the injured employee. This Court held, to the contrary, that the Act applies to all injuries upon navigable waters, whether or not State law also applies. The facts of *Calbeck* are not our facts; however, the *ratio decidendi* of *Calbeck* requires a holding that the Longshoremen's Act applies to dockside injuries.

In *Calbeck*, after reviewing the legislative history of the Act, this Court concluded, (borrowing the words of Judge Hutchison from *DeBardelben Coal Corp.* v. *Henderson*, 142 F.2d 481) that "the provision 'if recovery * * * may not validly be provided by state law' was placed in the Act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the Act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers." Moreover, this Court said of the Act in general (again borrowing the words of Judge Hutchinson):

> "The elaborate provisions of the Act, viewed in the light of prior congressional legislation as interpreted by the Supreme Court, leaves no room

> for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter * * *. In the application of the Act, therefore, the broadest ground it permits of should be taken."

Viewed in this way, the restriction of coverage to injury occurring on "navigable waters" as well as in the limitation regarding State law, stem from a Congressional excess of caution, rather than a purpose to restrict the operation of the Act to an ambit short of federal power over the subject matter. When the Act was passed, "navigable waters" defined what was then thought to be the limit of Federal maritime authority over personal injuries, and in view of this Court's readiness to strike down legislation in the field, as evidenced by *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 40 S. Ct. 438 (1920); and *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219, 44 S. Ct. 302 (1924), the Congress was troubled with a concern to "make it clear that it did not intend to legislate beyond its constitutional powers." *Calbeck* v. *Traveler's Insurance Co.*, supra. As used in 33 U.S. C.A. § 903(a), the words "navigable waters of the United States" refer to jurisdiction, not to a geographical line.

We believe that this is the meaning of *Calbeck*, and if that is true, it is clear that dockside injuries to longshoremen employed in loading or unloading the ship are within the terms of the Longshoremen's and Harbor Workers' Act. Since *Gutierrez* v. *Water-*

man Steamship Corp., 373 U.S. 206, 83 S. Ct. 1185 (1963), and *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 446, 76 S. Ct. 232 (1956), the constitutionality of such an application is beyond dispute.

In view of what nearly all would regard as the desirability of an inclusive system of compensation for longshoremen, whether injured aboard ship or at dockside, we point out that there is a ground less broad than the broadest ground of *Calbeck* for holding the petitioner's injury, and many similar dockside injuries, compensable under the Act. In our case, the petitioner was injured while helping to load the ship at a point on the dock extending over the Willamette River. Small boats sometimes navigate under the dock. The Willamette River under the dock, would, absent the structure, be "navigable waters of the United States." *U.S.* v. *Monticello*, 20 Wall 430, 87 S. Ct. 391 (1874); *U. S.* v. *Holt State Bank*, 270 U.S. 49, 46 S. Ct. 197 (1926); Robinson on Admiralty (1939 Ed.) 34 et seq.

Although docks traditionally have been considered a part of the land, *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, 42 S. Ct. 473 (1922), there is no constitutional impediment, especially since the enactment of the Admiralty Extension Act, 46 U.S.C.A. § 740, to an interpretation that docks are upon the "navigable waters of the United States" within the meaning of the Longshoremen's and Harbor Workers' Act. That interpretation of the Act does

no more violence to the statutory language than does an interpretation of the Death on the High Seas Act, 46 U.S.C.A. § 761 et seq., enacted before the advent of the passenger plane (March 30, 1920, c. 111, § 1,41 Stat. 537), to embrace tortious acts aboard aircraft. *D'Aleman* v. *Pan American World Airways*, 359 F.2d 493 (C.A. 2, 1958).

While we have suggested this possible alternative construction of the Act, we believe that its adoption, restricting compensation to injuries occurring over the water side of docks would, while embracing more accidents, create anomalies and excrescences of interpretation more extreme than those plaguing the administration of the Act at present. Accordingly, we submit that this Court should adhere to the rationale of *Calbeck* v. *Traveler's Insurance Co.*, and should hold that the Act covers all injuries to harborworkers which are fairly within the tort or contract admiralty jurisdiction of the United States.

Decisions of the Lower Courts

Whether or not *Calbeck* is thought controlling here, it must be apparent that an authoritative decision of this Court is required to halt a trend of decision that does violence to the Congressional purpose and is demoralizing to those whose work brings them within the ambit of the Act. There is, at present, nothing which can properly be described as a conflict among the Circuit Courts of Appeal. Those which have so far ruled upon the issue hold that injuries occurring upon a dock, without more, are not com-

pensable. *Michigan Mutual Liability Company* v. *Arrien*, 344 F.2d 640, (C.A. 2, 1965), cert. den. 382 U.S. 835 (See however, the persuasive opinion by Judge Palmieri in the District Court, 233 F. Supp. 496, S.D. N.Y., 1964, in support of a broader view); *Nicholson* v. *Calbeck, et al.*, — F.2d — (C.A. 5, Oct. 31, 1967); *McCollough* v. *The Traveler's Insurance Company, et al*, — F.2d — (C.A. 5, Aug. 9, 1967); *American Export Lines* v. *Revel*, 266 F.2d 82, 84 (C.A. 4, 1959); *O'Keeffe* v. *Atlantic Stevedoring Co.*, 354 F.2d 48, 50 (C.A. 5, 1965). Nevertheless, the decisions in this area have an unreal quality about them.

Thus, this Court has held that an injury on a marine railway 400 feet from the water's edge is compensable under the Act because the railway is a drydock. *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366, 74 S. Ct. 100 (1953). However, if a longshoreman suffers an injury on the dock while unloading or loading a ship, he is not within the coverage of the Act because the dock is an extension of land. *Houser* v. *O'Leary*, 383 F.2d 730 (C.A. 9, 1967); *Nicholson* v. *Calbeck*, — F.2d — (C.A. 5, Oct. 31, 1967). If a longshoreman is accidentally hoisted by the ship's boom and strikes his head on the dock, he is covered by the Act, because "suspended from the ship" which is "upon navigable waters." *O'Keeffe* v. *Atlantic Stevedoring Company*, 354 F.2d 48 (C.A. 5, 1967). If, however, instead of striking the dock while being lifted by a ship's boom, he is struck by the boom itself and injured, his injury is

not compensable because occurring on an extension of land. *Avery* v. *Oosting*, 245 F. Supp. 51 (D.C. Va. 1965). If the longshoreman falls from the dock and injures himself in the water, he is entitled to compensation, because his injury occurred "upon navigable waters." *Interlake S. S. Co.* v. *Nielsen*, 338 F.2d 879 (C.A. 6, 1964), cert. den. 381 U.S. 934, 85 S. Ct. 1765; *Marine Stevedoring Corp.* v. *Oosting*, 238 F. Supp. 78 (D.C. Va. 1965). If, however, he falls from the dock into the waters but injures himself by striking a part of the dock while falling, he is not covered, because the dock is an extension of land. *O'Keeffe* v. *Atlantic Stevedoring Co.*, 354 F.2d 48 (C.A. 5, 1965). On the other hand, a longshoreman injured upon a "skid" attached to a dock rather than upon the dock itself can obtain compensation because the "skid" is not a fixed part of the dock, and so is upon navigable waters. *Michigan Mutual Liability Co.* v. *Arrien*, 344 F.2d 640 (C.A. 2, 1965), cert. den. 382 U.S. 835.

During debate in the House of Representatives on the bill for the Longshoremen's and Harbor Workers' Act, Congressman LaGuardia, an "anchor man" for the proponents, argued:

> "This law simply gives the longshoremen the benefit of up-to-date legislation to cover injuries sustained in the course of their employment." (Cong. Record 5414)

Can it be said that the decisions above give effect to that purpose? We think not.

At one time it might have been thought necessary, as a matter of Constitutional construction, for the lower courts to draw distinctions of this kind in administering the Longshoremen's and Harbor Workers' Act. But as now interpreted, the Constitution requires no such distinctions and where the Constitution does not require it, Congress should not be supposed to have a purpose to demand these hypertechnicalities of interpretation. As this Court said in *Reed* v. *S.S. Yaka*, 373 U.S. 410, 83 S. Ct. 1349 (1963), after repudiating a "blind adherence to the superficial meaning of the statute":

> "We have previously said that the Longshoremen's Act 'must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results.'"

The interpretation we ask the Court to put upon the Act gives effect, as in *Reed*, to the Congressional purpose, while doing less violence than in *Reed* to the "superficial meaning of the statute."

CONCLUSION

The issue presented by this petition for writ of certiorari, as well as by the petition in the case of *Andrew Nicholson* v. *C. D. Calbeck*, No. 877 (October Term, 1967), and in the case of *James D. McCollough* v. *The Travelers Insurance Company, et al*, No. 788 (October Term, 1967), is of far-reaching importance to the administration of the Longshoremen's and Harbor Workers' Act and of concern to the thou-

sands of employees engaged in the vital and oftentimes hazardous work of the docks. For the reasons set forth above, this petition should be granted.

Respectfully submitted,

EDWIN J. PETERSON
RAYMOND J. CONBOY
POZZI, LEVIN & WILSON
Attorneys and Counsel for the
Petitioner, John Houser

APPENDIX "A"

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
FOURTEENTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act	Compensation Order Rejection of Claim
JOHN HOUSER, *Claimant*,	
v.	Case No. 991-2170
AMERICAN MAIL LINE, *Employer*,	
FIREMAN'S FUND INSURANCE COMPANY, *Insurance Carrier.*	

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the first day of May, 1965, the claimant above named was in the employ of the employer above named at Portland, Oregon, in the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for the payment of compensation under said Act was insured by Fireman's Fund Insurance Company; that on said date the claimant was performing service as

a slingman for the employer and engaged in unloading creosoted piling from a railroad car onto the deck of the vessel, GUAM BEAR, which was afloat in the Willamette River and tied up at the water side of Terminal No. 1, Berth 7; that his duties consisted of hooking a sling onto a load of piling which was then unloaded from the railroad car by means of the vessel's gear; that the claimant had stepped from a pile of pallet boards stacked on the dock to the railroad car and picked up a sling preparatory to hooking onto a load of piling when he fell over backwards from the railroad car to the dock, a distance of approximately 18 feet, in consequence of which he suffered injuries to his head, right shoulder and ribs; that Terminal No. 1, which is a dock approximately 1100 feet in length, is attached to the land at one end and juts outward to, and over the waters of the Willamette River for a distance of approximately 34 feet; that there are two sets of railroad tracks running alongside the dock and across the water side; that the gondola-type railroad car from which the piling was being unloaded was on the outside track approximately 8 feet 6 inches from the water side of the dock; that the injury sustained by the claimant had its inception on the railroad car and culminated on the dock; that the dock, due to its connection to the land, is an extension of the land; that the injury sustained by the claimant on May 1, 1965 did not occur upon the navigable waters of the United States (including any dry dock) and said injury is excluded under the provisions of Section 3(a) of the Act.

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim be, and it is hereby REJECTED for the reason that the injury

sustained by the claimant on May 1, 1965 did not occur upon the navigable waters of the United States (including any dry dock) within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand and filed at Seattle, Washington, this 15th day of July, 1965.

J. J. O'LEARY
Deputy Commissioner
Fourteenth Compensation District

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN HOUSER, *Libelant,* vs. J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, *Respondent,*	Civil No. 65-375 OPINION
AMERICAN MAIL LINE, LTD., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Intervenors.*	March 19, 1966

SOLOMON, Chief Judge:

Libelant, John Houser, appeals from a decision of the Deputy Commissioner denying him compensation benefits under the Longshoreman's and Harbor Worker's Compensation Act. 33 U.S.C. §§901-950. This case is now before the Court on motions for summary judgment filed by all of the parties.

The facts are not in dispute. Houser was injured on May 1, 1965, while employed as a longshoreman by W. J. Jones, Inc., stevedores. He was working as a slingman on a pier adjacent to the vessel GUAM BEAR, which was afloat in navigable waters. Houser's job was to stand aboard a railroad car and hook a sling onto a load of creosoted piling which was then lifted from the railroad car to the deck of the vessel by the vessel's gear. As Houser stepped aboard the railroad car and prepared to hook a sling onto a

load of piling he fell over backwards from the car to the pier, a distance of approximately 18 feet. He suffered injuries to his head, right shoulder, and ribs.

The pier, Terminal No. 1 of the Portland Public Docks, runs approximately 1,100 feet alongside the Willamette River. It extends on pilings 34 feet over the water. Two railroad tracks run along the pier; the one on which Houser was injured was within ten feet of the water side of the pier.

Compensation under the Longshoreman's and Harbor Worker's Act is available only when the injury is suffered "upon the navigable waters of the United States (including any drydock)". 33 U.S.C. § 903(a). The Deputy Commissioner followed a long line of cases holding that a pier is an extension of the land and held that Houser's injury was not compensable under the Act because it did not occur upon the navigable waters of the United States. See, e.g., *Swanson* v. *Marra Bros. Inc.*, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946); *Johnston* v. *Marshall*, 128 F.2d 13 (9 Cir. 1942); *American Export Lines, Inc.* v. *Revel*, 266 F.2d 82 (4 Cir. 1959).

Houser argues that the "navigable water" concept should be expanded to make coverage under the Act co-extensive with the limits of admiralty jurisdiction. The Admiralty Extension Act of 1948 extended maritime jurisdiction to injuries occurring on land but caused by a vessel on navigable water. 46 U.S.C. § 740. It thus made admiralty remedies available for at least some injuries suffered upon a pier. Houser then argues that State compensation plans cannot apply to injuries suffered within the admiralty jurisdiction [see *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917)] and

that the Longshoreman's Act must be interpreted to fill the void.

Houser's argument has been uniformly rejected, most recently in an opinion by Walter E. Hoffman, an able and distinguished trial judge from the Eastern District of Virginia, Norfolk Division. *East* v. *Oosting*, 245 F. Supp. 51 (E. D. Va. 1965). See also *Johnson* v. *Traynor*, 243 F. Supp. 184 (D. Md. 1965). *Cf. Michigan Mutual Liability Co.* v. *Arrien*, 344 F.2d 640 (2 Cir. 1965). These cases also reject the contention that the water under a pier is navigable within the meaning of the Act.

I am convinced that the interpretation given to the Act by these cases is correct. The libelant's motion for summary judgment is denied. The motion for summary judgment of the respondent and intervenors is granted.

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN HOUSER,
Appellant,

vs.

J. J. O'LEARY, Deputy Commissioner Fourteenth Compensation District, AMERICAN MAIL LINE, LTD., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,
Appellees.

No. 21,289

[September 27, 1967]

On Appeal from the United States District Court for the District of Oregon

Before: POPE, MERRILL and BROWNING, Circuit Judges

MERRILL, Circuit Judge:

The question presented by this appeal is whether the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, covers injuries occurring on wharves.

Appellant is a longshoreman who, on May 1, 1965, was engaged in loading the vessel Guam Bear at Portland. He was working as a slingman on a pier adjacent to the ship, which was afloat on navigable waters. His job was to stand on top of a railroad gondola car and hook a sling onto a load of cargo, which would then be lifted from the gondola to the deck of

the ship by the ship's gear. As Houser stepped aboard the gondola, he fell over backward from the car onto the pier, a distance of about 18 feet, and suffered severe injuries. The ship's gear played no part in the accident.

Section 903(a) provides:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable water of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *"

Appellee Deputy Commissioner rejected appellant's claim for compensation upon the ground that the wharf where the injury occurred was, under a settled line of precedent, an extension of the land to which it was attached, and thus that the injury had not occurred on navigable waters. The District Court affirmed on the same ground. 253 F.Supp 417 (D. Ore. 1966). We agree.

This court has, in the past, rejected coverage by the Act of injuries so located. *Johnston* v. *Marshall*, 128 F.2d 13 (9th Cir.) *cert. denied*, 317 U.S. 649 (1942).[1] Appellant contends, however, that the "nav-

[1] Even prior to the enactment of the Longshoremen's Act in 1927 injuries occurring on wharves were held to be land injuries and thus not on the "navigable waters" which then constituted all that was within the scope of general maritime law. *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922). Decisions since the Act have assumed that by its terms it excludes injuries suffered on piers, wharves and similar structures. *E.g., Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946); *O'Keefe* v. *Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir. 1965); *American Export Lines* v. *Revel*, 266 F.2d 82 (4th Cir. 1959).

igable waters" concept should be expanded to make coverage under the Act coextensive with the limits of Admiralty jurisdiction. He points out that his employment under a maritime contract is within traditional Admiralty contract jurisdiction and that some wharf locus torts are covered by the current view of Admiralty tort jurisdiction. As support for his contention he relies on language in *Calbeck* v. *Travelers Insurance Company*, 370 U.S. 114, 130 (1962). There the Court, quoting Judge Hutcheson in *DeBardeleben Coal Corporation* v. *Henderson*, 142 F.2d 481, 483-84 (5th Cir. 1944), stated:

> "It is sufficient to say that Congress intended the Compensation Act to have a coverage coextensive with the limits of its authority * * *. In the application of the Act, therefore, the broadest ground it permits of should be taken."

To read this language as applying to the problem before us is to read it out of context. Neither *Calbeck* nor *DeBardeleben* was concerned with the meaning of the "navigable waters" requirement of § 903(a). The problem in those cases was how to construe the *second* requirement of § 903(a): whether the Act provided compensation for injuries sustained by employees on navigable waters "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." 370 U.S. at 117.

It may well be true that when it was judicially established that wharves were extensions of land the state of the law then excluded injuries occurring on land from Admiralty tort jurisdiction, and that the law has since changed and is still undergoing change in this respect. The fact is, however, that Congress

did not choose to make the coverage of the Act co-extensive with Admiralty jurisdiction in respect to locus of injury. Legislative history referred to in *Calbeck, supra*, at 122, shows that an earlier version of the Act provided:

> "This Act shall apply to any employment performed on a place within the Admiralty jurisdiction of the United States * * *."

This language was rejected in favor of "upon the navigable waters of the United States." As stated by Judge Hays, dissenting in *Michigan Mutual Liability Company* v. *Arrien*, 344 F.2d 640, 649 (2d Cir.), *cert. denied* 382 U.S. 835 (1965),[2] this "was a conscious choice of adopting known distinctions based on pre-existing Admiralty decisions, rather than tying the scope of the Act to changing concepts of maritime jurisdiction."[3]

That this is a choice the courts should not upset is strongly suggested by *Calbeck* where, in reference to

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[2] In this case the court held for coverage by the Longshoremen's Act of an injury occurring on a "skid," a portable extension of a wharf. It recognized, however, that "injuries on wharves or other extensions of land permanently covering navigable waters were not to be covered." 344 F.2d at 644.

[3] Appellant relies on the Admiralty Extension Act of 1948, which extended maritime tort jurisdiction to injuries occurring on land but caused by a vessel on navigable waters. 46 U.S.C. § 740. That this statute did not by implication extend the coverage of the Longshoremen's Act is clear for the reasons given in *Johnson* v. *Traynor*, 243 F. Supp. 184, 190-94 (D.Md. 1965). The shoreward movement of the doctrine of unseaworthiness, noted in *Gutierrez* v. *Waterman S. S. Corp.*, 373 U.S. 206, 214-15 (1963), is similarly inapplicable to appellant's claim. Although Houser, since he was engaged in unloading cargo, may well have come within the Admiralty jurisdiction for the purpose of recovery under the unseaworthiness doctrine had ship's gear been involved, he cannot claim that this status allows him to claim compensation under the Longshoremen's Act

the problem with which it was dealing, the Court stated:

> "Such a purpose would require, rather, that federal coverage expand and recede in harness with developments in constitutional interpretation as to the scope of state power to compensate injuries on navigable waters. But that would mean that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that that implies; and that each and every award of federal compensation would equally be a constitutionally premised denial of state competence in a like situation. We cannot conclude that Congress imposed such a burden on the administration of compensation by thus perpetuating the confusion generated by *Jensen*. To dispel that confusion was one of the chief purposes of the Longshoremen's Act." 370 U.S. at 126.

If we adopted appellant's view that the Act's coverage flows and ebbs with the scope of Admiralty tort jurisdiction, every case in this area would require a decision of constitutional dimension as to the reach of Admiralty and we would be importing into the Act the very evil the Court sought to prevent in *Calbeck*.

Judgment affirmed.

BRIEF IN OPPOSI - TION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court

of the United States

OCTOBER TERM, 1967

No. 1017

JOHN HOUSER,

Petitioner,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District,

and

AMERICAN MAIL LINE, LTD., a corporation,

and

FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Respondents.

BRIEF OF RESPONDENTS AMERICAN MAIL LINE, LTD., and FIREMAN'S FUND INSURANCE COMPANY

In Opposition to Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

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In the Supreme Court
of the United States
OCTOBER TERM, 1967

No. 1017

JOHN HOUSER,

Petitioner,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District,

and

AMERICAN MAIL LINE, LTD., a corporation,

and

FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Respondents.

BRIEF OF RESPONDENTS AMERICAN MAIL LINE, LTD., and FIREMAN'S FUND INSURANCE COMPANY

In Opposition to Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

Respondents American Mail Line, Ltd. and Fireman's Fund Insurance Company pray that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The order of the respondent deputy commissioner (Appendix A herein) dated July 15, 1965, holding that petitioner was not entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq. is not reported.

The opinion of the District Court (Appendix B herein) dated March 19, 1966, affirming the respondent deputy commissioner is reported at 253 F. Supp 417.

The opinion of the Court of Appeals for the Ninth Circuit affirming the District Court (Appendix C herein) filed September 27, 1967, is reported at 383 F.2d 730.

JURISDICTION

The decision of the Court of Appeals was made on September 27, 1967. The petitioner applied for an extension of time within which to file a petition for a writ of certiorari and was granted until January 15, 1968. The petition was docketed on January 13, 1968.

QUESTION PRESENTED

The single question presented is whether benefits provided by the Longshoremen's and Harbor Workers' Compensation Act will be extended to a longshoreman injured on a wharf while assisting in the loading of a vessel afloat in navigable waters of the United States.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 903(a)) provides:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . ." March 4, 1927, c. 509, § 3, 44 Stat. 1426.

STATEMENT OF THE CASE

The respondent deputy commissioner found the facts to be as follows (paraphrasing):

On May 1, 1965, petitioner, John Houser, was employed by respondent[1] American Mail Line as a slingman. Respondent American Mail Line was loading piling aboard the SS GUAM BEAR. The vessel was moored alongside Berth No. 7 at Terminal No. 1 on the Willamette River in Portland, Oregon. Petitioner's work at the time of his injury was to hook the slings to creosoted piling on gondola cars so that the vessel's gear could lift the piling from the gondola car to the deck of the vessel. While petitioner was engaged in hooking up the sling, he fell from the gondola car to the dock.

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[1] The District Court opinion says that petitioner was employed by W. J. Jones, Inc. This is incorrect. Petitioner was employed by respondent American Mail Line, Ltd.

The gondola car was located on railroad tracks running parallel to the face of the dock. The tracks were eight feet six inches from the waterside of the dock. The dock extends out over the Willamette River a distance of approximately 34 feet (at zero datum, R. 35).

The deputy commissioner found that the dock was an extension of land and that the injury did not occur upon navigable waters of the United States, and accordingly denied compensation.

REASONS FOR REFUSING THE WRIT

(One) The courts, including this Court, have uniformly held that injuries on the wharf are non-maritime.

(Two) There is no conflict between the decision of the Court of Appeals herein and another Court of Appeals decision.

(Three) The decision of the Court of Appeals is not in conflict with any decision of this Court and specifically is not in conflict with *Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196, 8 L. Ed. 2d 368 (1962).

(Four) The Court of Appeals decision does not unfavorably affect the administration of the Longshoremen's and Harbor Workers' Compensation Act in such a way as to require an authoritative decision from this Court.

DECISIONS BY COURTS OF APPEALS

The petitioner reports (Pet. Br. 7) that two other cases raising the same issues are presently before this Court. The petitions for writ of certiorari were denied on January 15, 1968, in both cases. *Andrew Nicholson* v. *Calbeck*, No. 877, October Term, 1967; *James D. McCollough* v. *The Traveler's Insurance Co., et al*, No. 788, October Term, 1967.

In both *Nicholson* and *McCollough*, the Court of Appeals for the Fifth Circuit held that injuries on the dock are not within the ambit of the Longshoremen's and Harbor Workers' Compensation Act.

Certainly, this case presents no more meritorious basis for granting the petition than the Fifth Circuit cases.

In *Johnston* v. *Marshall*, 128 F.2d 13 (C.A. 9, 1942) cert. den. 317 U.S. 629, reh. den. 318 U.S. 799, the Court of Appeals held that an injury on the dock was not within the scope of the Act and having been settled precedent for 25 years the holding should stand. The petitioner admits (Pet. Br. 19, 20) that there is no conflict among the courts.

What the courts have been saying all these years is that a wharf is a part of the land and not within maritime jurisdiction or on navigable waters. See, e.g., *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A.L.R. 1013 (1922).

The maritime jurisdiction of the Federal government is clearly limited by constitutional grant; the problem lies in determining the boundary. *U. S.* v. *Matson Navigation Co.*, 201 F.2d 610 (C.A. 9, 1953). Congress cannot by legislation expand the boundary. The ST. LAWRENCE, 66 U.S. (1 Black) 522, 17 L. Ed. 180 (1861). Chief Justice Hughes has told us:

> "The framers of the Constitution did not contemplate that the maritime law should remain unalterable. . . . But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction." *Detroit Trust Co.* v. *The THOMAS BARLUM*, 293 U.S. 21, 43, 44, 55 S. Ct. 31, 79 L. Ed. 176 (1934).

The reason that a wharf has never been held to be within the maritime jurisdiction is:

> ". . . the bridges, shore docks, protection piling, piers, etc., pertained to the land. They were structures connected with the shore and immediately concerned with commerce on land. None of these structures were aids to navigation within the maritime sense, but extensions of the shore and aids to commerce on land as such." *Cleveland Terminal R. R.* v. *Cleveland Steamship Co.*, 208 U.S. 316, 321, 28 S. Ct. 414, 52 L. Ed. 508 (1908).

THE CALBECK DECISION

A careful reading of *Calbeck* v. *Traveler's Insurance Co., supra,* convinces one that this Court very carefully excised an error which had crept into the proper interpretation of the Longshoremen's and

Harbor Workers' Compensation Act. This Court made it clear that what it was doing was removing a court-made exception to coverage under the Act; the Court was not broadening coverage beyond what was intended by Congress. The Court simply held that "on navigable waters" meant what it said and the court-engrafted exception "except in the case of new construction" was to be stricken.

In the *Calbeck opinion* (370 U.S. 114 at 129) this Court was of the view that Judge Hutcheson was correct in *Debardelben Coal Corp.* v. *Henderson*, 142 F.2d 481, 483, 484 (C.A. 5, 1944) when he said that the "local concern" doctrine was a pre-Act device to afford state coverage to on the water injuries. The 1927 federal act eliminated the need for the doctrine and the "local concern" doctrine certainly was not to be termed the exclusive remedy in any event. Judge Hutcheson relied on an earlier Fifth Circuit decision, *Continental Casualty Co.* v. *Lawson*, 64 F.2d 802 (C.A. 5, 1933) in which the court had held injuries on a marine railway within the Act. The court stated, *inter alia*,:

> "The Act does not undertake to provide compensation for injuries occurring on the ordinary dock or wharf used in loading and unloading cargo, doubtless because in the opinion of Congress, either this kind of dock, being an extension of the land, was exclusively within the jurisdiction of the States [citing cases]; or because the Act would not apply to most cases of injury to longshoremen who usually are employed to work on the dock or wharf not by the shipown-

> ers but by independent contracting stevedores. The use of the phrase 'including any drydock' in No. 3 [33 U.S.C.A. Sec. 903(a)] discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction over the former but over the latter class of work." 64 F.2d 802 at 805.

In *Calbeck* this Court noted that Congress did not intend to cover injuries on the wharf. The Court quoted the Senate report as follows:

> "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States." Senate Report No. 973, 69th Congress, First Session, at 16, quoted in *Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 121, footnote 10.

Calbeck, searching for Congressional intent, eliminated one unnecessary judicial distinction, there is no need now to consider engrafting another judicial distinction onto the Act.

Petitioner's whole case rests on the proposition that:

> ". . . as used in 33 U.S.C.A. § 903(a), the words 'navigable waters of the United States' refer to jurisdiction, not to a geographical line.

> "We believe that this is the meaning of *Calbeck*, and if that is true, it is clear the dockside injuries to longshoremen employed in loading or unloading the ship are within the terms of the [Act]." (Pet. Br. 17).

The fallacy in petitioner's reasoning is that once again coverage is sought to be based on the type of work being performed, i.e., loading or unloading the ship. Such amorphous distinctions were expressly condemned in *Calbeck* and earlier in *Pennsylvania R. R.* v. *O'Rourke*, 344 U.S. 334, 73 S. Ct. 302, 97 L. Ed. 367 (1953).

Furthermore, in *Calbeck*, this Court expressed its disapproval of a federal-state coverage rule which depended on the ebb and flow of the court-defined limits of federal maritime jurisdiction. The Court said:

> "But that would mean that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that implies; . . . . To dispel that confusion was one of the chief purposes of the Longshoremen's Act." *Calbeck* v. *Traveler's Ins. Co.*, *supra* at 126.

Petitioner suggests (Pet. Br. 18) an alternative basis for awarding him federal benefits. He suggests that because the wharf on which he was working extended out over the river water, he was working "on navigable waters." This claim, petitioner admits, creates opportunities for

> ". . . anomalies and excrescences of interpre-

tation more extreme than those plaguing the administration of the Act at present." (Pet. Br. 19).[2]

ADMINISTRATION OF THE ACT

Petitioner (Br. 19-22) seeks to make out a need for a consideration of this case as a basis for an authoritative decision in a problem area citing several cases. The fallacy in petitioner's plea is that this case is not the problem case he would make it. The problem cases are boundary line cases. He did not fall across the boundary between state and federal coverage. He was not thrown or catapulted across the line. He was not on one side and injured by equipment or cargo moving from the other side. The petitioner fell from a gondola car at rest on the dock to the same dock. As the Court of Appeals so aptly noted in its opinion, (Appendix C, p. 20) ship's gear was not involved and petitioner could not rely on tort jurisdiction under the doctrine of unseaworthiness or the Admiralty Extension Act of 1948 (Appendix C, p. 22, footnote 3).

There is nothing in the record here which would indicate that administration of the Act would be aid-

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[2] The record is not at all clear that petitioner was actually over the water. Petitioner's witness Gregor testified only that at "zero datum" the water extended under the dock about 34 feet (R. 35). The Court of Appeals for the Fifth Circuit rejected the contention that waters under a pier are navigable.

> "The limited navigability of the water under the pier is characteristic of piers generally and as a matter of law is not navigability within the meaning of the term 'navigable waters.'" *Nicholson* v. *Calbeck*, 385 F.2d 221, 222 (C.A. 5, 1957).

ed by moving coverage shoreward. The problems attendant upon determining status[3] or situs would exist no matter where the line were drawn.

The edge of the wharf next to the ship is a definite and clearly defined and the most easily understood and easily administered line. Efforts to move it should be resisted.[4]

The able district judge who wrote the opinion below in this case relied heavily on the exhaustive opinion of District Judge R. Dorsey Watkins in the cases of *Johnson & Klosek* v. *Traynor*, 243 F. Supp. 184 (D. Md., 1965). Respondents find the opinion of Judge Watkins scholarly and also persuasive from a common sense standpoint. Judge Watkins concluded:

> "The line had to be, and has to be, drawn somewhere. Congress drew it between the land and the navigable waters of the United States." 243 F. Supp 184 at 189.

The argument (Pet. Br. 18) that all harborworkers ought to have the same benefits fails to solve the problem; a line has to be drawn somewhere and when it is, men are going to be falling across it physically if the line is geographical, or working on both sides of it if it is defined in terms of duties.

Petitioner suggests no guide which would help

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[3] Petitioner points up his maritime status as a slingman (Pet. Br. 5). Status as a test of coverage has been rejected by this Court. *Pennsylvania R. R. Co.* v. *O'Rourke*, supra.

[4] It should be noted that current proposals in Congress to amend the Act do not contain any provisions to move the boundary shoreward and thus correct the "violence" and "demoralizing" petitioner purports to see. (See S.B. 2485.)

deputy commissioners decide on a day to day basis whether a particular shoreside injury was suffered, according to petitioner's test, by a ". . . harborworker . . . within the tort or contract admiralty jurisdiction of the United States." (Pet. Br. 19).

CONCLUSION

The face of the wharf is the logical boundary between the Longshoremen's and Harbor Workers' Compensation Act and state compensation acts. In this case, and in the vast majority of cases, such a boundary facilitates administration of compensation claims, thereby insuring injured workmen early and certain benefits. The petition should be denied.

Respectfully submitted,

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APPENDIX "A"

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
FOURTEENTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act	Compensation Order Rejection of Claim
JOHN HOUSER, *Claimant,*	
v.	Case No. 991-2170
AMERICAN MAIL LINE, *Employer,*	
FIREMAN'S FUND INSURANCE COMPANY, *Insurance Carrier.*	

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the first day of May, 1965, the claimant above named was in the employ of the employer above named at Portland, Oregon, in the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for the payment of compensation under said Act was insured by Fireman's Fund Insurance Company; that on said date the claimant was performing service as a slingman for the employer and engaged in unload-

ing creosoted piling from a railroad car onto the deck of the vessel, GUAM BEAR, which was afloat in the Willamette River and tied up at the water side of Terminal No. 1, Berth 7; that his duties consisted of hooking a sling onto a load of piling which was then unloaded from the railroad car by means of the vessel's gear; that the claimant had stepped from a pile of pallet boards stacked on the dock to the railroad car and picked up a sling preparatory to hooking onto a load of piling when he fell over backwards from the railroad car to the dock, a distance of approximately 18 feet, in consequence of which he suffered injuries to his head, right shoulder and ribs; that Terminal No. 1, which is a dock approximately 1100 feet in length, is attached to the land at one end and juts outward to, and over the waters of the Willamette River for a distance of approximately 34 feet; that there are two sets of railroad tracks running alongside the dock and across the water side; that the gondola-type railroad car from which the piling was being unloaded was on the outside track approximately 8 feet 6 inches from the water side of the dock; that the injury sustained by the claimant had its inception on the railroad car and culminated on the dock; that the dock, due to its connection to the land, is an extension of the land; that the injury sustained by the claimant on May 1, 1965 did not occur upon the navigable waters of the United States (including any dry dock) and said injury is excluded under the provisions of Section 3(a) of the Act.

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim be, and it is hereby REJECTED for the reason that the injury sustained by the claimant on May 1, 1965 did

not occur upon the navigable waters of the United States (including any dry dock) within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand and filed at Seattle, Washington, this 15th day of July, 1965.

J. J. O'LEARY
Deputy Commissioner
Fourteenth Compensation District

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN HOUSER, *Libelant,*	)	
vs.	)	
J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, *Respondent,*	)	Civil No. 65-375
	)	OPINION
AMERICAN MAIL LINE, LTD., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Intervenors.*	)	March 19, 1966

SOLOMON, Chief Judge:

Libelant, John Houser, appeals from a decision of the Deputy Commissioner denying him compensation benefits under the Longshoreman's and Harbor Worker's Compensation Act. 33 U.S.C. §§ 901-950. This case is now before the Court on motions for summary judgment filed by all of the parties.

The facts are not in dispute. Houser was injured on May 1, 1965, while employed as a longshoreman by W. J. Jones, Inc., stevedores. He was working as a slingman on a pier adjacent to the vessel GUAM BEAR, which was afloat in navigable waters. Houser's job was to stand aboard a railroad car and hook a sling onto a load of creosoted piling which was then lifted from the railroad car to the deck of the

vessel by the vessel's gear. As Houser stepped aboard the railroad car and prepared to hook a sling onto a load of piling he fell over backwards from the car to the pier, a distance of approximately 18 feet. He suffered injuries to his head, right shoulder, and ribs.

The pier, Terminal No. 1 of the Portland Public Docks, runs approximately 1,100 feet alongside the Willamette River. It extends on pilings 34 feet over the water. Two railroad tracks run along the pier; the one on which Houser was injured was within ten feet of the water side of the pier.

Compensation under the Longshoreman's and Harbor Worker's Act is available only when the injury is suffered "upon the navigable waters of the United States (including any drydock)". 33 U.S.C. § 903(a). The Deputy Commissioner followed a long line of cases holding that a pier is an extension of the land and held that Houser's injury was not compensable under the Act because it did not occur upon the navigable waters of the United States. See, e.g., *Swanson* v. *Marra Bros., Inc.*, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946); *Johnston* v. *Marshall*, 128 F.2d 13 (9 Cir. 1942); *American Export Lines, Inc.* v. *Revel*, 266 F.2d 82 (4 Cir. 1959).

Houser argues that the "navigable water" concept should be expanded to make coverage under the Act co-extensive with the limits of admiralty jurisdiction. The Admiralty Extension Act of 1948 extended maritime jurisdiction to injuries occurring on land but caused by a vessel on navigable water. 46 U.S.C. § 740. It thus made admiralty remedies available for at least some injuries suffered upon a pier. Houser then argues that State compensation plans cannot apply to injuries suffered within the admiralty ju-

risdiction [see *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917)] and that the Longshoreman's Act must be interpreted to fill the void.

Houser's argument has been uniformly rejected, most recently in an opinion by Walter E. Hoffman, an able and distinguished trial judge from the Eastern District of Virginia, Norfolk Division. *East* v. *Oosting*, 245 F. Supp. 51 (E.D. Va. 1965). See also *Johnson* v. *Traynor*, 243 F. Supp. 184 (D. Md. 1965). *Cf. Michigan Mutual Liability Co.* v. *Arrien*, 344 F.2d 640 (2 Cir. 1965). These cases also reject the contention that the water under a pier is navigable within the meaning of the Act.

I am convinced that the interpretation given to the Act by these cases is correct. The libelant's motion for summary judgment is denied. The motion for summary judgment of the respondent and intervenors is granted.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN HOUSER, *Appellant,*
vs.
J. J. O'LEARY, Deputy Commissioner Fourteenth Compensation District, AMERICAN MAIL LINE, LTD., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Appellees.*
No. 21,289

[September 27, 1967]

On Appeal from the United States District Court for the District of Oregon

Before: POPE, MERRILL and BROWNING, Circuit Judges

MERRILL, Circuit Judge:

The question presented by this appeal is whether the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, covers injuries occurring on wharves.

Appellant is a longshoreman who, on May 1, 1965, was engaged in loading the vessel Guam Bear at Portland. He was working as a slingman on a pier adjacent to the ship, which was afloat on navigable waters. His job was to stand on top of a railroad gondola car and hook a sling onto a load of cargo, which would then be lifted from the gondola to the deck of the ship by the ship's gear. As Houser stepped aboard

the gondola, he fell over backward from the car onto the pier, a distance of about 18 feet, and suffered severe injuries. The ship's gear played no part in the accident.

Section 903(a) provides:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable water of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *"

Appellee Deputy Commissioner rejected appellant's claim for compensation upon the ground that the wharf where the injury occurred was, under a settled line of precedent, an extension of the land to which it was attached, and thus that the injury had not occurred on navigable waters. The District Court affirmed on the same ground. 253 F. Supp. 417 (D. Ore. 1966). We agree.

This court has, in the past, rejected coverage by the Act of injuries so located. *Johnston* v. *Marshall*, 128 F.2d 13 (9th Cir.) *cert. denied*, 317 U.S. 649 (1942).[1] Appellant contends, however, that the "nav-

[1] Even prior to the enactment of the Longshoremen's Act in 1927 injuries occurring on wharves were held to be land injuries and thus not on the "navigable waters" which then constituted all that was within the scope of general maritime law. *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922). Decisions since the Act have assumed that by its terms it excludes injuries suffered on piers, wharves and similar structures. *E.g.*, *Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946); *O'Keefe* v. *Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir. 1965); *American Export Lines* v. *Revel*, 266 F.2d 82 (4th Cir. 1959).

igable waters" concept should be expanded to make coverage under the Act coextensive with the limits of Admiralty jurisdiction. He points out that his employment under a maritime contract is within traditional Admiralty contract jurisdiction and that some wharf locus torts are covered by the current view of Admiralty tort jurisdiction. As support for his contention he relies on language in *Calbeck* v. *Travelers Insurance Company*, 370 U.S. 114, 130 (1962). There the Court, quoting Judge Hutcheson in *DeBardeleben Coal Corporation* v. *Henderson*, 142 F.2d 481, 483-84 (5th Cir. 1944), stated:

> "It is sufficient to say that Congress intended the Compensation Act to have a coverage coextensive with the limits of its authority * * *. In the application of the Act, therefore, the broadest ground it permits of should be taken."

To read this language as applying to the problem before us is to read it out of context. Neither *Calbeck* nor *DeBardeleben* was concerned with the meaning of the "navigable waters" requirement of § 903(a). The problem in those cases was how to construe the *second* requirement of § 903(a): whether the Act provided compensation for injuries sustained by employees on navigable waters "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." 370 U.S. at 117.

It may well be true that when it was judicially established that wharves were extensions of land the state of the law then excluded injuries occurring on land from Admiralty tort jurisdiction, and that the law has since changed and is still undergoing change in this respect. The fact is, however, that Congress

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No. 1067

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOHN HOUSE, PETITIONER

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1017

JOHN HOUSER, PETITIONER

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

Petitioner in this case recognizes (Pet. 7, 22) that he is raising the identical issue presented by the petitions in *Nicholson* v. *Calbeck*, No. 877, this Term, and *McCollough* v. *The Travelers Insurance Co.*, No. 788, this Term. On January 15, 1968, after the filing of the instant petition, the Court denied certiorari in *Nicholson* and *McCollough*. There are, we submit, no reasons to treat this petition differently.

1. Petitioner is a longshoreman whose claim under the Longshoremen's and Harbor Workers' Compensa-

tion Act, 33 U.S.C. 901 *et seq.*, was rejected by the Deputy Commissioner on the ground that a pierside injury is not covered by the Act (Pet. App. 25). Both the district court and the court of appeals affirmed the denial of the claim on this ground.

Petitioner was working on top of a loaded gondola-type railroad car located on tracks running the length of a pier. In the course of loading the contents onto a ship he fell onto the pier and was injured. The pier was erected on pilings resting on the bed of navigable waters of the United States (Pet. App. 26). The courts below held that the injury did not occur "upon the navigable waters of the United States" within the meaning of the Act, 33 U.S.C. 903(a), because piers have traditionally been viewed as extensions of land.

2. For the reasons set forth more fully in our Memorandum In Opposition in *Nicholson* v. *Calbeck*, *supra*, the decision below is correct and does not warrant review. The Longshoremen's Act was passed to insure coverage for injuries that were beyond the realm of state workmen's compensation acts. It was settled, however, before the passage of the Act that injuries occurring on docks, wharves, and piers were compensable under state workmen's compensation laws and did not give rise to maritime claims. See *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263; *T. Smith & Son, Inc.* v. *Taylor*, 276 U.S. 179, 181, 182. Thus, the relevant Senate Report accompanying the Federal Longshoremen's Act stated:

> [I]njuries occurring in loading or unloading are not covered unless they occur on the ship or be-

> tween the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.

S. Rep. No. 973, 69th Cong., 1st Sess., p. 16.

This Court subsequently indicated in *Swanson* v. *Marra Bros., Inc.*, 328 U.S. 1, that injuries on docks, wharves, and piers were not covered by the Act:

> * * * [S]ince * * * [the Longshoremen's] Act is restricted to compensation for injuries occurring on navigable waters, *it excludes from its own terms * * * any remedies against the employer for injuries inflicted on shore.*

Id. at 7. (Emphasis added.)

3. The recent case of *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, relied on by petitioner (Pet. 15-19), is consistent with this result. The general purposes of the Act as seen by the Court were: (1) to insure that all maritime injuries are covered by some compensation act; and (2) to eliminate uncertainty in the choice of remedy. 370 U.S. at 119-122. Neither of these objectives is contravened by the holding of the respondent deputy commissioner and lower courts here, since that holding, in accord with forty years of administrative practice, see 1927 A.M.C. 1558, 1855 (Opinion Nos. 5, 16), merely reaffirms the long-standing rule in an area always covered by state workmen's compensation acts. The issue in *Calbeck* was explicitly confined to the question of coverage *vel non* of an injury that took place on an uncompleted vessel concededly afloat on the navigable waters. The holding that Congress intended the federal act to apply in that situation does not suggest that the Court

was abandoning the settled standards for determining the logically anterior and statutorily distinct jurisdictional question whether the incident occurred "upon the navigable waters" at all.

4. Petitioner concedes that the lower courts have uniformly rejected the position he urges (Pet. 19). See *Nicholson* v. *Calbeck*, 385 F. 2d 221 (C.A. 5), certiorari denied, No. 877, this Term (January 15, 1968); *Michigan Mut. Liability Co.* v. *Arrien*, 344 F. 2d 640, 644 (C.A. 2) (dictum), certiorari denied, 382 U.S. 835; *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82, 84 (C.A. 4) (dictum); cf. *Travelers Ins. Co.* v. *Shea*, 382 F. 2d 344 (C.A. 5), certiorari denied *sub nom. McCollough* v. *The Travelers Insurance Co.*, No. 788, this Term (January 15, 1968); accord, *Johnston* v. *Marshall*, 128 F. 2d 13 (C.A. 9), certiorari denied, 317 U.S. 629. Any change in this settled state of the law should be sought from Congress.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968

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